Supreme Court, U.S.
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No. 97-652

In The

Supreme Court of the United States

October Term, 1997

LAWRENCE MARKS; SUN BANK/MIAMI, N.A. and EDWARD A. MOSS, as personal representatives of the estate of Eugene Marks; MORRIS S. MARLIN, as personal representative of the estate of Paul Marks; HERMAN MARKS; IRENE O. MARKS, individually and as personal representative of the estate of Stanley Marks; MARKS DEVELOPMENT, INC.; and ISLAND IN THE SUN CONDOMINIUMS OF KEY WEST FLORIDA, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. With respect to the first question presented, the plaintiffs and the government obviously differ in their reading of this Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). We will leave a reading of the decision to the Court, confident that we have accurately parsed it and that the government has not. We also remind the Court that, with the singular exception of the instant case, the Court of Appeals for the Federal Circuit has read *Kaiser Aetna* exactly as we have read it, so the government's attempt to distinguish it here is plainly suspect. We stand by our demonstration of conflict.

The government apparently lacks confidence in its reading of *Kaiser Aetna* because it attempts to finesse the first question presented here with an alternative argument. It argues that the conflict is irrelevant in any event because the Corps halted the plaintiffs' development "in aid of navigation" rather than "in aid of environmental protection":

> . . . the Corps has consistently justified stopping petitioners' fill activities due to the potential for interference with navigation. See Pet. App. 6a (invoking the Rivers & Harbors Appropriation Act of 1899, 33 U.S.C. 403, not the Clean Water Act, as the basis for Corps' cease and desist orders).

(Brief in Opposition, p. 8). We cannot allow this demonstrably false statement to go unchallenged.

It is true that the 1973 cease and desist telegram addressed "fill in the navigable waters of the United

States adjacent to the Riviera Canal" (Pet. App. 5a). However, the reference to "navigable waters" was simply a reference to the property below the MHWL, which is the line by which "navigable waters" is defined; it was not an assertion of the Corps' jurisdiction "in aid of navigation." The plaintiffs did not place any fill in the Riviera Canal; the fill was placed on "wetlands," and boats simply cannot "navigate" on "wetlands." Just as importantly, even a cursory skimming of Judge Aronovitz's 1982 decision will reveal that the Corps asserted its jurisdiction over the plaintiffs' wetlands for environmental and ecological reasons, and for no other purpose – and most certainly *not* "in aid of navigation" or in furtherance of any other form of interstate commerce which the government's "navigational servitude" is designed to protect.

And while it is also true that the Corps asserted its jurisdiction under the Rivers and Harbors Act rather than the Clean Water Act, it is no secret that the Rivers and Harbors Act was being utilized by the Corps at the time to extend its tentacles well beyond matters of navigation, as a tool to promote environmental and ecological concerns.* In addition, of course, the Corps relied upon the Rivers and Harbors Act to promote its ecological concerns for the plaintiffs' wetlands, rather than the Clean Water Act, because the "Clean Water Act of 1977" (§ 1, Pub. L. 95-217) was not even in existence when the cease

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* *See, e. g., United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Zabel v. Tabb*, 430 F.2d 199, 25 A.L.R. Fed. 684 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). *See generally* Annotation, *Authority of Secretary of Army to Deny Dredging and Filling Permit for Ecological Reasons Under § 10 of Rivers and Harbors Act of 1899*, 33 U.S.C.S. § 403, 25 A.L.R. Fed. 706 (1975).

and desist telegram was sent four years before its enactment, in 1973. We stand by our initial argument.

2. With respect to the second question presented, and notwithstanding that the government placed nearly all of its eggs in this basket below, the government has now tacitly conceded our point – that the lower courts erred in concluding that the temporary taking of the plaintiffs' property above the MHWL was not compensable because the property increased in value during the period of taking and was sold for a profit after the taking ceased. The government argues only that the profit was "relevant in showing that the property had economically viable uses, as the sale occurred during the period when petitioners alleged that the government's regulation caused a temporary taking" (Brief in Opposition, p. 10). We must respectfully disagree with this additional attempt to finesse the now conceded error of the courts below.

The plaintiffs' property above the MHWL was rendered undevelopable by the Corps' actions in 1973. Its use as developable property was not restored to the plaintiffs until the federal courts ordered the government to permit its development as planned, in 1984. The sales which the government claims are "relevant" occurred in 1986 and 1989 – *after* the Eleventh Circuit affirmed Judge Aronovitz's decision restoring an economically viable use of the property above the MHWL to the plaintiffs. The sales may therefore have some bearing on the date the temporary taking ceased, but they most certainly do not demonstrate that the property had an economically viable use from 1972 to 1984, as the lower courts plainly erred in concluding below.

3. The bulk of the government's argument is devoted to distracting the Court from the principal questions presented. To that end, the government argues that its favorable summary judgment was essentially a "fact-bound application of settled law [that] does not warrant this Court's review," and it attempts to justify the ruling with several miscellaneous "facts" which purportedly support the judgment despite the errors inherent in it (Brief in Opposition, p. 9). Given the complexity of the facts, the government can perhaps be excused for its misunderstanding of them, but because this Court's determination of whether to grant or deny certiorari should not rest upon a false factual foundation, we are constrained to set the record straight briefly in conclusion.

First, the government argues that the Corps' 1973 cease and desist order did not preclude the plaintiffs from developing the property above the MHWL. This assertion flies squarely in the face of Judge Aronovitz's finding of fact in the underlying litigation that, because the government had no idea of the location of the MHWL at the time, "the developers of the project were unable to proceed with the project for fear that additional impermissible filling would take place" (Pet. App. 69a). The assertion also flies squarely in the face of the conclusion of law bottomed upon this finding in the underlying litigation:

> . . . The government has argued that the Defendants were free in January, 1973, to continue development above the mean high water line since the cease and desist order only addressed

> land below the mean high water line demarcation. Unfortunately, however, the government was unable to inform the Defendants where that elusive line might be, so the government was inviting the Defendants to risk the possibility of continuing to be in violation of the law. This court does not believe that this course of action was a feasible alternative or that any reasonably prudent businessman would gamble on the loss of additional time, labor and money. . . .

(Pet. App. 88a).

Most respectfully, the plaintiffs were plainly deprived of their use of the property above the MHWL by the Corps' 1973 cease and desist order. Under settled principles of the doctrine of "collateral estoppel," the government is plainly bound by that fact in this litigation. And it is *that* fact to which the "settled law" should have been applied below in ruling on the government's motion for summary judgment – not the factual position squarely *rejected* by the federal courts in the underlying litigation.

Second, the government argues that its favorable summary judgment is supported by the plaintiffs' concession that they did not develop the property due to a lack of funds. Actually, what the trial court concluded was that the property had an economically viable use during the period of the temporary taking because Lawrence Marks had admitted (in a discovery deposition taken in the underlying litigation) that, in addition to the Corps' actions, the property was not filled above the MHWL after 1973, and before the date of the new wetlands regulations, because he did not have the money, and there was no money to proceed because of a recession

from 1973 to 1976 (Pet. App. 51a). Frankly, we fail to see any connection between this observation and the conclusion that the property had an economically viable use during the period of temporary taking, but we will address it nevertheless.

The fact of the matter (as the trial court's factual recitation reveals) is that the plaintiffs had entered into a joint venture agreement with Context Industries in 1972, and the money to proceed was thereby secured. And, as Mr. Marks noted on the same page of the discovery deposition upon which the trial court relied, "when we first started to fill, we were going to build right away" (Ct. App. App. 98-100). The Corps then intervened and stopped development of the property; and because of the Corps' intervention, the plaintiffs' financial backer, Context Industries, successfully sued for rescission of the joint venture agreement (*id.* 93-94). It was principally for *that* reason, and only incidentally because replacement financial backing was not readily obtainable because of the ensuing recession (not to mention the cease and desist order), that the plaintiffs did not have the money to proceed.

In any event, this issue was actually litigated between the parties in the underlying action, and Judge Aronovitz squarely rejected the government's contention in this regard – finding as a fact instead that "[h]ad the Corps not intervened in January, 1973, without locating the mean high water line[,] the land above the mean high water line *could have been developed*, and once done, *it would have been grandfathered and exempt* from the Corps' revised wetlands policy" (Pet. App. 88a; emphasis supplied). Most respectfully, this finding of fact, made after a

full-blown trial, renders any suggestion to the contrary contained in a mere discovery deposition moot; and because of the settled doctrine of "collateral estoppel," the trial court was not free to find to the contrary in this case – especially on a motion for summary judgment.

In addition, whether the plaintiffs had the money to proceed with their proposed development after 1973 is plainly irrelevant to the question of whether a compensable temporary taking occurred. It is irrelevant because, as Judge Aronovitz also found as a fact, the plaintiffs could not have proceeded to develop the property in the face of the Corps' demands even if the money to do so had been available. The availability of financial backing after Context Industries withdrew because of the Corps' actions may have some relevance to the question of the amount of the plaintiffs' damages, but it has no relevance at all to the question of whether a compensable temporary taking occurred – and the unavailability of additional financial backing for a mere three years most certainly provides no relevant support for a conclusion that the property had an economically viable use during the more than a decade in which it remained a breeding ground for mosquitoes and was rendered entirely useless to the plaintiffs by the Corps' actions.

The government's remaining efforts to finesse the important questions presented here are adequately addressed in our petition, so we will not repeat ourselves in reply. We simply submit once again that, although the underlying facts are complex enough to confuse even the most astute of courts (which, we believe, is most likely what happened below), it should ultimately be as plain as the nose on the government's face that the plaintiffs *did*

suffer a compensable temporary taking of their 52-acre tract for more than a decade, until its use as developable property was finally restored to them by the federal courts. The Fifth Amendment requires that they be compensated for that taking, and we respectfully urge the Court to restore that important constitutional right to the plaintiffs, and to similarly situated future litigants, by its proper enforcement in this case.

Respectfully submitted,

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